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Term No. 150.

In the Supreme Court of the United States:

OCTOBER TERM, A. D. 1904.

IN EQUITY.

R. E. HODGE and
MRS. J. TABOR,
Plaintiffs in Error,
vs.
MUSCATINE COUNTY, et. al.
Defendants in Error.

Appeal from the Supreme Court of the State of Iowa.

ARGUMENT FOR DEFENDANTS IN ERROR.

HENRY JAYNE,
Attorney for Defendants in Error.

GERMAN-POSTEN PTG. CO. MUSCATINE

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STATEMENT OF CASE.

In this case the following questions were raised upon which issues were joined:

(*a*) Whether or not cigarettes, shipped in a number of boxes, each box containing ten cigarettes, which boxes were given, absolutely loose, to an express company by the manufacturer in Missouri, with instructions to deliver them to a consignee in Iowa, were original packages in such sense that the person in Iowa selling the cigarettes by the box of ten cigarettes would be amenable to the laws of that state, by reason of such law being an attempt to regulate interstate commerce and, therefore, void;

(*b*) That the subject matter of Section 5007, of the Code of Iowa, was not included in the objects set forth in the title of the act, of which it is a part, to-wit: "An act to revise, amend and codify statutes in relation to crimes and punishments," because said section provides for the assessment, levy and collection of a tax and consequently, is not properly entitled, and is, therefore, void;

(*c*) That said Section 5007 is not uniform in operation and discriminates between jobbers and wholesalers doing an interstate business with customers outside the state, and the plaintiffs in error, who are inhabitants of the State of Iowa, and within its jurisdiction, and said section is, therefore, void;

(*d*) That the owner of the property wherein cigarettes were sold had no knowledge of such sales, nor any notice that a tax was assessed and levied against her property by reason

thereof, and that as said section does not provide for any notice and authorizes an assessment, said section is, therefore, void, because it authorizes the taking of property without "due process of law."

(*e*) That said Section 5007 violates Section 7 of Article 7 of the Constitution of the State of Iowa, because it does not *distinctly state the tax and the object to which it is* to be applied.

As the first three questions herein stated compose the case of Cook vs. Marshall County, No. 98, in this court, and are there argued, counsel for defendants in error in this case will confine himself to merely submitting a limited argument as to these three questions.

ARGUMENT

(a)

Is Section 5007 of the Code of Iowa an attempt to regulate interstate commerce and, therefore, void?

It is a well settled rule that whatever article of commerce is recognized as fit for barter or sale, when its manufacture is made subject to Federal regulation and taxation, must be regarded as a legitimate article of commerce although it may be within the police power of the states.

In re Rahrer, 140 U. S., 559.
Brown vs. Maryland, 12 Wheat. 419.
Leisy vs. Hardin, 135 U. S., 100.
Austin vs. Tenn., 50 L. R. A., 478.

And if Congress authorizes its importation, no State has a right to prohibit its introduction.

License Cases, 5 How., 504.

However, a state is not bound to furnish a market for such articles, or abstain from passing any law which may be necessary or advisable to guard the health or morals of its citizens, although such law may discourage importations or diminish profits of the importer.

Boston Beer Co. vs. Kas., 97 U. S., 25.
Mugler vs. Kas., 123 U. S., 623.
Foster vs. Kas., 112 U. S., 201.

Police power may be lawfully resorted to for the purpose of preserving public health, safety and morals; a large discrimination is necessarily vested in the legislature to deter-

mine what the public interests require and what measures are necessary for the protection of such interests.

Holden vs. Hardy, 169 U. S., 366, 392.

A State cannot prohibit the sale of articles of lawful commerce, when imported, by the importer, when such articles do not become a part of the common mass of property within the State, and so long as they remain in the original packages in which they were imported.

Leisy vs. Hardin, 135 U. S., 100.
Schollenberger vs. Penn., 171 U. S., 1.
Bowman vs. Railway Company, 125 U. S., 465.
State vs. Winters, 25 Pac. 237.
May vs New Orleans, 178 U. S., 496.
License Cases, 5 How., 504.
Brown vs. Maryland, 12 Wheat., 419.

An original package has been defined to be "such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers, *in the ordinary course of actual commerce.*"

Com. vs. Schollenberger, 156 Pa., 201.
McGregor vs. Cone, 73 N. W., 1043 (Iowa.)

And again, in Austin vs. Tenn., 50 L. R. A., 478, where the Court lay down the rule to be: That where the mode of putting up a package is not adapted to meet the requirements of inter-state commerce, *but the requirements of an unlawful domestic retail trade*, the dealer will not be protected on the ground that he is selling an original package.

Also, Com. vs. Bisham, 138 Pa., 639.
Haley vs. Nebr., 42 Nebr., 556, (60 N. W., 962.)

Com. vs. Paul, 170 Pa., 284.
State vs. Chapman, 47 N. W., 411.

That the size of the package is immaterial where bona fide transactions are carried on.

5 How., 608.
Comm. vs. Zelt, 138 Pa., 615.
Austin vs. Tenn., 50 L. R. A., 478.

The United States Revised Statutes, Section 3392, requiring cigarettes to be put in packages of 10, 20, 50 or 100 each, is for the purpose solely of taxation and the better enforcement of the internal revenue law.

To our mind there are two propositions which should be considered in determining this question:—

First: Is the transaction in good faith? and

Secondly: If so, were the packages shipped in the usual and ordinary manner and according to the customary usages of trade and commerce?

If the shipment was made in the customary way and in the course of a bona fide transaction, then the packages so shipped would come within the law regulating inter-state commerce and the packages and each of them would not be liable to taxation in the state of Iowa. If, on the other hand, this shipment was made for the sole purpose of testing the law; of attempting to find a loop-hole by means of chicanery and subterfuge, by which they could introduce an article held obnoxious and deleterious to good health and morals, into this state, then it cannot be said the transaction was in good faith.

The plaintiffs in error with a knowledge of the different decisions effecting this question opposite to their intentions and interests; in the face of the fact that

the article which they contemplated importing, was in itself highly injurious, deliberately associated themselves, as consignees, with persons whose past endeavors had been solely aimed at setting the law of the State at naught, and then and there allowed these manufacturers to send them such prohibited articles, in order that a foundation might be laid on some supposed technicality of law by which the will of the people of Iowa might be ruthlessly disregarded. Surely such a transaction, made under such conditions, cannot be held by this honorable Court to be bona fide transactions. The association of the parties under these circumstances alone, brands their operations with suspicion.

The Supreme Court of Iowa took occasion to state in Cook vs. Marshall county, 93 N. W., 372, in treating the manner of shipment by the American Tobacco Company to appellee as follows: "The care and precision with which we are told what the Tobacco Company did not do in making the shipment is no less conspicuous than the omission to tell what its agent, the Express Company, did do in that regard. * * Yet we know, as a matter of common observation and immemorial usage, that this is not the manner in which bona fide transtions are carried on between the manufacturer and wholesale dealer residing in different states, and is, therefore, not entitled to claim exemption attaching to inter-state commerce."

Secondly:

Can it be said that the customary and usual method of shipping cigarettes is to procure an Express Company to take a certain number of loose boxes of cigarettes piled in a heap, without box, wrapper, string or binding of any sort to hold them together, and carry them, in this condition, to a consignee in a sister State? With the exception of the case

of Ausin vs. Tenn., supra, (and there a basket was used by the Express Company to take the shipment of cigarettes), we have not one single case of record wherein a like and similar shipment of cigarettes, as is set forth in this case, has ever been made.

Viewing the transaction in the light of custom and sound reason, can it be honestly and sincerely contended that the packages of cigarettes in this case were shipped in an usual and ordinary manner, and according to the usages of trade?

If they were shipped *otherwise* and with the definite object of evading the laws of this state, then such packages, so shipped, are proper subjects of taxation, and Section 5007 is constitutional, as it does not attempt to regulate inter-state commerce.

(*b*)

It is contended that Section 5007 is unconstitutional in that it was enacted under Title 24 of Code of Iowa, "Of Crimes and their Punishments," and sub-title (Chapter 11), "Of Offenses Against Public Policy," and does not conform to Section 29, Article 3, of the Constitution of Iowa, to wit: "Every act shall embrace but one subject and matter properly connected therewith, which subject shall be expressed in the title."

In construing the law, courts will endeavor to put such an interpretation upon it as will avoid conflict with the constitution, resolving every reasonable doubt in favor of the statute and not against it; not regarding so much the form and manner of expression, as the *nature* and *object* of its provisions and the *end to be accomplished*; construing the act so as to support its validity; a brief and concise statement sufficient to indicate the nature of the act is all that is necessary;

the act should not be declared unconstitutional unless it is in such plain conflict with the constitution as to leave no discretion to the Court in the premises.

Black Const. Law, page 266, 58, 59.
58 Cal., 635; 2 Iowa, 280; 13 Minn., 341, 349.
68 N. Y., 381; 30 Iowa, 9; 61 Am. Dec., 338, n.
Am. Enc. Law, Vol. 6, 2d ed., p. 921, n.
20 Iowa, 338; 22 Atl. Rep., 923.
33 Hun., 279; 80 Mo., 678; 20 Fla., 522.
9 Ind., 380; 15 Tex., 311; 74 Am. Dec., 522.
61 Am. Dec., 331 n; 15 Ia., 304; 2 Ia., 165.

In this case, if Section 5007 is naturally and reasonably connected with the subject of the title, is cognate or germane thereto, and the subjects embraced have congruity, that is all that is necessary, the title is satisfied. If there is an "unity of object" in the different sections and the general object is stated in the title, it makes no difference as to how many diversified provisions the act may have, it is sufficient to comply with the constitution.

2 Cal., 289; 45 Mo., 495; 44 Ind., 151.
13 Neb., 121; 47 Minn., 578; 107 Ia., 111.
94 Iowa, 1; 51 Iowa, 197; 61 Am. Dec., 331.
State ex rel, Dwensing vs. Roby, 142 Ind., 168 (33L R. A., 219).
173 Ill., 19; 64 Am. St. Rep., 72, 73; 77 Pa. St. 77.

Section 5006 of the Code, prohibits the keeping for sale, selling and giving away of cigarettes, under a penalty of fine and imprisonment.

Section 5007 provides for the assessing of a mulct tax.

Section 5006 was first enacted under the present title,

(Laws 26th General Assembly, C. 96), and Section 5007 is an amendment thereto.

That Section 5006 was enacted to prevent the sale and gift of cigarettes certainly cannot be disputed. Section 5007, as an amendment thereto, is just as certainly intended to aid and enforce the suppression of the sale of cigarettes, because it provides for a tax "in addition to all other taxes and penalties," and is a "mulct" tax also, by reference to the mulct liquor tax. A mulct is a "fine imposed for an offense—a penalty."

Section 5006 is certainly germane to title 24 of Code of Iowa, and Section 5007 is equally germane and naturally and reasonably connected therewith because of the "unity of object" of the two sections—both being for the suppression and prevention of sale of cigarettes, but in a different manner; Section 5007 being an enlargement of the powers of, and an aid to Section 5006.

It is also contended, but we think without sufficient ground, that Section 5006, relating to criminal procedure, and Section 5007, relating to civil remedies and procedure, cannot be joined under title 24 of the Code.

If this be true, then many of the laws of the State of Iowa are null and void. (See Sections 4822 and Sections 4834 and 4835, of the Code of Iowa).

In State ex. rel. Duensing vs. Roby, 142 Ind, 168, (33 L. R. A., 219) where the construction of a title, similar with respect to ~~Section 29, Article 8, of Constitution~~ Title 24 of the Code of Iowa was passed upon, the Court say: "If the civil remedy under consideration, provided in the statute, extended to the suppression of all violations of law and public morals, or any part of them, outside of the things made unlawful in the

main part of the act, the case would be different and the act would embrace two independent and separate subjects of legislation. But the civil remedy provided has no connection with any other subject of legislation, either direct or remote. It has no connection with *any other crime* or *misdemeanor* than those *defined in the act.* Nor can it be used to suppress any other violation of law than those that fall *within* the *provisions* of *the act.* It is necessarily and inherently connected with the main part of the act."

Again in Perry vs. Gross, the Court say: "Objection is made to this amended statue that it is unconstitutional and void, because not within the scope of the act. It is claimed on behalf of plaintiff that this is a civil right and wholly inconsistent with punishment for a criminal offense. The object of the act is to prohibit gambling by imposing the additional penalty of requiring those, who engage in such practice, by reason of which persons lose money or property, to restore the same to the rightful owner. The title of the act is sufficient to authorize the legislators to make the amendment in question."

The Court further say: "The effect of the provisions of this section we are construing, is to *mulct* the winner in the loss of his gains and thereby it aids in *effecting* the *general object* of the act—the *suppression* of gambling."

Perry vs. Gross, 41 N. W., 799.

Larne d vs. Tiernan, 110 Ills., 173.

Section 5006 and 5007 were enacted as a part of the general codification of the laws of Iowa, as effected by the extra session of the 26th General Assembly, and being enacted together and relating to the same subject matter, it is evident that the two sections are to be construed as one, in dealing

with the cigarette question. (See Section 50, Code of (Iowa.) And section 5007 is not open to the constitutional objection that it does not conform to Section 29, article 3, of the Constitution of Iowa.

(c)

It is further contended that the statute relating to cigarettes discriminates and is not uniform in operation as between jobbers and wholesalers doing an interstate business with customers outside of the state and the plaintiffs in error who are inhabitants of the State of Iowa and within its jurisdiction and that said statute is, therefore, void.

The words "wholesalers and jobbers" clearly mean those who handle goods in the *bulk*; that is, buy the bulk or original package and sell by the bulk or original package, either for themselves or for others for whom they are agents.

73 N. W., 1041.

The exemption made in Section 5006, relating to wholesalers and jobbers is as follows: "Provided, ~~that~~ that the provisions hereof shall not apply to the sales of jobbers doing an interstate business with customers outside of the State."

Section 5007 says: "But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the State."

To interfere with one who resides in Iowa and who buys in the bulk or original package, with intent and does sell to customers outside of the State, is too clearly unconstitutional to need argument.

Austin vs. Tenn., 50, L. R. A., 478.
Leisy vs. Hardin, 135, U. S., 100, Iowa.
Minn. vs. Barber, 136, U. S., 313.

License Cases, 5 How., 504.

Construing the statute according to the adopted rules of interpretation, we find that both sections, 5006 and 5007, are silent as to prohibiting importers from importing cigarettes into the State of Iowa.

It has been said: "A State cannot, in the absence of legislation by Congress, ***prohibit importation*** of articles of lawful commerce from abroad or from a sister State; or, when imported, ***prohibit their sale*** by the importer when such articles do not become a part of the common mass of property within the State, and so long as they remain in the original packages in which they were imported."

Leisy vs. Hardin, 135, U., S., 100, Iowa.
Schollenberger vs. Penn., 171, U. S., 1.

We ask, then, can a State enact such laws as will tend to suppress and prevent the sale of articles dangerous to health, safety and morals of its citizens, sold within the State?

By way of answer to the above, it has been said in abundant authority that the "police power may be lawfully resorted to for the purpose of preserving public health, safety or morals, or abatement of public nuisances; a large discrimination is necessarily vested in the legislature to determine what public interests require and what measures are necessary for the protection of such interests."

Holden vs. Hardy, 169 U. S., 366, 392.
Boston Beer Co., vs. Kan., 97 U. S., 25.
Mugler vs. Kan., 123 U. S., 623.
Foster vs. Kas., 112, U. S., 201.
Austin vs. Tenn., 50, L. R. A., 478.

From the above authorities cited, it seems to be a well settled rule that wholesalers and jobbers may buy and import

in the bulk or original package and sell the same in the bulk or original package outside the State and escape taxation upon the article handled, while the same is within the state of their residence.

There is no discrimination here as the law clearly deals with those in a certain class, by which all who are in that class are governed alike.

If plaintiffs in error were wholesalers or jobbers doing business outside of the State, as above stated, it is plainly erroneous to tax them in this case; if they are not, and by their own admission they are not, and the State inherently possesses the power to tax, especially where public health, safety and morals are vitally concerned, then they cannot now complain because the State has exercised those rights which "in its nature acknowledges no boundary."

The wholesaler and jobber is precluded from doing such a business as plaintiffs in error are engaged in within the State by the laws of this State. Now, if any wholesaler could also claim exemption by reason alone of being a *wholesaler*, and at the same time be allowed to sell other than original packages within this State to citizens of this State, as plaintiffs in error have done, then the question of discrimination and uniformity of operation of these statutes might be legitimately raised; but such is not the case.

Plaintiffs in error knew of this Mulct Cigarette Tax; knew its terms, at least they are presumed in law to know them, and yet, they deliberately and intentionally violated this law –sold cigarettes, other than in original packages, publicly and openly, presumably to test its constitutionality. They cannot now complain. "He who seeks equity must do equity." From the above authorities, we would say that

section 5007 is not unconstitutional; that it *is* uniform in operation and does not discriminate.

(*d*)

Plaintiffs in error claim that section 5007 is unconstitutional in that it deprives an owner of his property "without due process of law."

In arguing this plea, it might be well to determine:

1. The nature of the tax imposed;

2. Is notice to owner of property assessed necessary thereunder.

No. 1. Section 5006 provides for a fine and imprisonment for selling cigarettes as follows: "For the first offense shall pay a fine of not less than $25.00 nor more than $50.00 and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense, he shall pay, upon conviction thereof, a fine of not less than $100.00 nor more than $500.00 and costs of prosecution, or be imprisoned in the county jail not to exceed six months." * * * *

Section 5007 is as follows: "Tax on sale. There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes or for the purpose of being filled with tobacco for smoking, are sold or given away, or *kept with* intent to be sold, bartered or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct

liquor tax, and shall be a perpetual lien upon all property, both personal and real used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the state."

As the above Section 5007 definitely refers to the mulct liquor tax, let us look at that for a moment.

Kinne, J., said in Smith vs. Skow, speaking of the mulct liquor tax: "This sum which is provided shall be a lien upon property, both personal and real is *not*, in fact, a *tax*, as we usually use the word. It matters not that the legislature, in the statute, speaks of this *license* or *charge* as a tax, that does not make it a *tax*. *It is in reality a charge* or *license exacted for the privilege of carrying on the business of vending* liquors, * * * * * As we have said, this is not a *tax*, and certainly not a *general tax*. * * * * * It is such a *charge* as attaches to and becomes a lien on the real estate when it is *assessed* and does not take priority over the lien of a mortgage then existing upon real estate."

Smith vs. Skow, 97 Iowa 640.

The mulct liquor tax, Section 2432, does not provide for a fine and imprisonment and in this it differs from the cigarette law.

As seen in Smith vs. Skow, supra, the mulct liquor tax is a charge or license on the occupation or business of selling liquors—it allows the selling under certain conditions. Section 5006 of the cigarette law absolutely prohibits the sale of cigarettes, under fine, * * and Section 5007 imposes

a tax "in addition to all other taxes and penalties" and stipulates that "the payment of such tax shall not be a bar to prosecutions" under Section 5006.

While the mulct liquor and mulct cigarette taxes are identical in that the tax imposed is on occupations, they are nevertheless, radically different in the objects sought to be gained thereby. The mulct liquor tax is a license which allows the sale of liquors; the cigarette tax is not a license, because Section 5006 positively forbids the sale of cigarettes under fine and imprisonment. (38 Ohio State, 206). The cigarette tax, in and of itself, is in the nature of an additional penalty, under police regulation to protect the public from the evils arising from the use of cigarettes, and, an occupation charge for the purpose of revenue.

Hodge vs. Muscatine County, 96 N. W. 969, Iowa.

The power to tax is inherent in the government. It is a legislative power and is limited only by constitutional provisions, subject thereto, it extends to *everything* and everybody, as the legislature *may see fit to apply it.* Courts cannot control its exercise, unless such exercise conflicts with constitutional limitations.

Am. & Eng. Ency. Law, Vol. 25, p. 18, and cases there cited.

Ferry vs. Deneen, 82 N. W., 424, Iowa.

27 Iowa, 28; 76 Ill., 561; 52 Wis. 53,

Hagar vs. Reclamation Dist. 111 U. S., 701.

The power to impose privilege and occupation taxes exists *independently* and *concurrently* in the state and Federal government, subject to constitutional restrictions; the only direct limitation therein contained, is, that no tax shall be laid on articles exported from any state. Being in the discretion

of the legislature, it may select *some* for this purpose and *exempt* others, and select the mode in which taxes shall be levied.

A. & E. E Law, Vol. 25, pages 21 n, 479, 481, 492.
Ward vs. Maryland, 12 Wall., 418; 5 How.; 504.
License Tax Cases, 5 Wall., 71; 69 Ill., 80.
U. S. Const. Art. 1, Sec. 9, Par. 5.
60 Am. Dec. 581; 133 Mass. 161.
62 Pa. St. 491; 89 Ga., 639; 33 Fed. Rep. 121.

It may be said that the demand made for money under the police power, is secondary to the police regulation out of which the demand grows; while in the case of taxation, the principal object is *revenue*. This distinction is not to be lost sight of, even though the procedure for collection may be *similar* in both cases.

A. & E. E. Law, Vol. 25, page 20.
46 Mich. 183; 46 Ill. 392.
Cooley on Taxation, 2 Ed. p. 586.
11 Johns, 77; License Cases, 5 Wall. 462.

"That a tax is imposed for the double purpose of regulation and revenue is no reason for declaring it invalid."

Hodge vs. Muscatine County, 96 N. W., 968;
2 Desty on Taxation, 1384.

An *occupation charge* is different from a *general tax*, and the constitutional provisions that all taxes shall be equal and uniform apply only to general taxation. It is sufficient if all in the same class are taxed alike.

A. E. E. Law, Vol. 25, pages 480, 481, 489.
49 Cal. 557; 102 Ill. 560; 11 Ohio St. 449.
46 N. J. Eq. 270; 62 Pa. St. 491; 89 Ga. 639.

33 Fed. Rep. 121; 4 Tex. 137; 6 Wall. 606.
82 N. W. 424; 29 Wis. 592; 84 Me. 215.
81 Va. 473; 66 N. W., 893, (Iowa.)

That an occupation tax is distinct from a general tax and that it was the intention of the legislators in enacting Section 5007 to so make the distinction, is seen from an examination of said section. It provides that "such tax shall be in *addition to all other taxes* and penalties." The tax is made distinct in itself, and it is provided that it shall have nothing to do with any *other* tax or penalty, by making such tax "in addition to *all* other taxes and penalties"; consequently it is not only made a charge but also a penalty by the very words of the statute itself.

The difference between a general tax and an occupation charge or tax, is that the general tax is assessed *solely* for revenue; while the occupation tax or charge may be assessed under police regulations, to protect public health and morals or public safety; the regulation of the object specified, and not for revenue.

A. E. E. Law, Vol. 25, p. 20.
Cooley on Taxation 2d Ed. p. 586.

From the above authorities and an examination of Section 5007, it seems that the tax therein imposed was for "indemnity and protection to the public against evils resulting from the nature and character of the business by taxing such business," and is also "in the nature of a police regulation, but is not to be wholly so regarded."

Hodge vs. Muscatine County, 69 N. W., 968.

NUMBER TWO. Is notice to the owner of the property assessed, necessary under the tax imposed by Section 5007?

As Section 5007 specifically and plainly refers to the mulct liquor tax in regard to assessment, etc., of taxes, as follows: "Such tax * * * * shall be assessed, collected and distributed in the same manner as the mulct liquor tax," it would, perhaps, be proper first to consider the mulct liquor tax with a view to the above proposition being applicable to it, before we pass upon Section 5007.

In the several Iowa cases the Supreme Court of that State in passing upon the Mulct Liquor Law, held, that such tax *was a charge* for carrying on the business and acted the same upon all persons and property coming within its provisions; that as the law was general in its scope and provisions, all persons liable thereunder must appear and pay the tax *without notice*, and that notice was "*no more necessary to the property owner than in cases of taxes generally.*"

Re Smith, 73 N. W., 605.

Smith vs. Skow, 66 N. W., 893.

It is further held that the tax imposed is also a penalty, and that the rules governing *ordinary* taxes *should not* govern in this case.

Ferry vs. Deneen, 82 N. W., 424.

We find that the Supreme Court of Iowa has determined that the tax provided in Section 5007 is a penalty and an occupation charge, (Hodge vs. Muscatine County, 96 N. W., 968). We also find that this same Court has held that the mulct liquor tax is a penalty, and an occupation charge, (Ferry vs. Deneen, 82 N. W., 424, and Smith vs. Skow, 66 N. W., 893); both taxes, then, because each is a penalty and an occupation charge, belong to the same class, and quoting, supra, "it is sufficient if all in the same class are taxed alike," (62 Pa. St., 491; 33 Fed. Rep., 121): We would then sub-

mit, that *no notice* being necessary in the mulct liquor tax, it would follow that *no notice* is necessary in the mulct cigarette tax.

The cigarette tax, by its terms, if nothing else, is different from a general tax, and the law of general taxation does not apply to it. Being a penalty and occupation charge, and the Legislature, inherently possessing that power incidental to sovereignty, may, in its discretion, and so long as there is no conflict with constitutional limitations, impose such tax upon any certain occupation for the protection of public health and morals, and provide and select the mode in which such tax may be assessed and levied. 6 Wall, ~~906~~ 606; 82 N. W., 424.

In determining in what mode this cigarette tax should be assessed, collected and distributed, we have but to read Section 5007, to find that it is to be assessed, collected and distributed in the same manner as the mulct liquor tax. As the provisions of the mulct liquor tax are, then, of the greatest importance in reaching a solution of this question, we give them in full; (before amendment by the Twenty-ninth General Assembly):

"Section 2433. RETURN BY ASSESSOR.—In the months of December, March, June and September of each year, and before the twentieth day of each of said months, the assessor of each township, town or city, or assessment district thereof, shall return to the County Auditor a list of persons who are, or since the last quarterly return have been, engaged in carrying on within said township, town, city or assessment district, the business of selling or keeping for sale intoxicating liquors, or maintaing any place where such liquors are sold or kept for sale, and also a description of the real property

wherein or whereon such business is carried on, or such place is maintained, with the name of the occupant or tenant and owner or agent. Any assessor wilfully failing to comply with the provisions of this section shall pay a fine of fifty dollars and costs for each offense." (Same, Sec. 2.)

SECTION 2436. QUARTERLY INSTALLMENTS—LIEN PENALTY.—On the first day of January, of April, of July and of October of each year, there shall be due and payable from each person returned to the County Auditor by the Assessor, or by three citizens as aforesaid, as a person carrying on the business of selling or keeping for sale, intoxicating liquors, or maintaining a place where such liquors are sold or kept for sale, a quarterly installment of the mulct tax herein provided for, and the tax due from any person so returned by the Assessors, or by three reputable citizens, shall be a lien upon the real property wherein or whereon such business is returned as being carried on, or such place maintained, whether the person carrying on such business, or maintaining such place, is correctly described or not. If the installments of tax due and payable, as aforesaid, are not paid within one month after the same become due and payable, then a penalty of twenty per cent shall be added thereto, together with one per cent per month thereafter until paid. Whoever is assessed under the provisions of this chapter shall be liable at least for one quarterly installment of the tax herein provided for, notwithstanding any such person may discontinue business when so assessed, and notwithstanding the fact that he may have been in the business for a less period than three months; and if he shall continue therein for a longer period than three months, he shall be liable for an additional quarterly installment, subject to abatement on account of discon-

tinuance of the business before the expiration of such second or subsequent quarter." (Same, Sec. 11.)

"Section 2437. LIST CERTIFIED TO TREASURER.—On the last day of December, of March, of June and of September, in each year, the County Auditor shall certify to the County Treasurer a complete list of the names of persons returned to him by the Assessors, or entered on the sworn statements made to him by citizens as aforesaid, together with a description in each case of the real property wherein or whereon the business is carried on, or the place maintained, and the name of the occupant or tenant, and the owner or agent of such property." (Same, Sec. 10.)

"Section 2438. ENTRY OF TAX.—The County Treasurer shall thereupon enter upon a book known as the 'mulct tax book' a quarterly installment of the mulct tax, as due and payable by the person carrying on such business, or keeping such place, and as a lien and charge upon and against the real property wherein or whereon such business is carried on, or such place maintained." (Same, Sec. 10.)

"Section 2439. WHEN DELINQUENT—SALES FOR.—After the expiration of one month from the date when such tax becomes due and payable, if not paid, it shall be delinquent and collectible by the Treasurer in the same method as that in which other delinquent taxes are collectible, and all the provisions as to the collection of other delinquent taxes shall apply. Tax sales for such delinquent taxes shall also be made on the first Monday in June of each year, in the same manner and to the same effect as on the first Monday in December, and all the provisions of law as to tax sales in December shall apply to such sales in June. When real es-

tate offered at tax sale under this section shall be passed for want of bid covering amount of tax due thereon, it shall be advertised and sold by the Treasurer at next semi-annual tax sale, to the highest bidder. (Same, Secs. 12, 13)."

"Section 2440. COLLECTION BY SELLING PERSONAL PROPERTY.—At any time after the quarterly installment of such taxes, becomes delinquent, the Treasurer may collect the same by seizing and selling any personal property used in connection with the business or in maintaining the place. (Same Sec. 13)."

"Section 2441. APPLICATION FOR REMISSON.—At the meeting of the board of supervisors next following the listing as aforesaid, application may be made to remit the tax, by petition duly verified and filed with the County Auditor at least eight days before the time set for the consideration of the case, and notice for the same length of time must be served on the county attorney in writing. The averments in the petition shall be deemed denied, and witnesses may be examined, and the Chairman of the Board, or, in his absence or inability to act, any member of the same may administer an oath in the same form and of the same effect as to penalties for testifying falsely as if administered in Court. (Same, Sec. 4)."

"Section 2442. HEARING—EVIDENCE—APPEAL. — On the application to remit the tax, the owner of the property may be heard in support of the same, and evidence of the general reputation of the place shall be admissible, and if upon the hearing of the case it shall be shown that the petitioner, his agent or tenant has paid a retail liquor dealer's internal revenue tax to the United States, covering any portion of the time and premises as set forth in the listing of said

real estate, it shall be prima facie evidence that the person and property are subject to the tax. If upon said hearing it be found by majority vote of the Board of Supervisors that the tax is proper, it shall stand, otherwise it shall be remitted and the Board shall enter its order on its record. Either the petitioner or the County Attorney may appeal to the District Court, and if the petitioner appeals he shall be required to give bond for the costs which have accrued, or may accrue in a further progress of the case. Notice of the appeal shall be served upon the appellee or his attorney, and upon the County Auditor within ten days after the decision by the Board of Supervisors; whereupon the Auditor shall file a full and complete transcript of the record of the proceedings in said cause, together with the original papers, in the office of the Clerk of the District Court in said county. In case the finding of the Board of Supervisors shall be against the tax, and the County Attorney shall fail to take an appeal to the District Court within ten days from such finding as above provided, any three citizens of the county may take such appeal within ten days thereafter, upon giving a good and sufficient bond for costs, and the same proceeding shall be had as if the appeal had been taken by the County Attorney. The Auditor shall charge and tax as fees for the transcript and writing up of the record, ten cents per hundred words. (Same Sec. 5)."

"Section 2444. TRIAL ON APPEAL—JUDGMENT AGAINST PROPERTY.—On the appeal the trial shall be conducted as an equitable cause, and the first term shall be the trial term. Should it appear, either on the trial before the Board of Supervisors or in the District Court, that there have been sales of intoxicating liquors made in or upon the premises listed

for taxation, the tax shall be confirmed against the person, corporation, or partnership conducting the business, and if it appears that the wrong name or an alias has been used, then the record and assessment list may be amended and the true name inserted; and if it shall appear at such trial that the owner or his agent knew, or by the use of reasonable care or diligence might have known, of the sales of intoxicating liquors as aforesaid, the tax shall be confirmed against the property by an order of record, and the Clerk of the District Court shall certify such fact to the County Auditor, with the amount of costs made in the trial of the case. (Same Sec. 6)."

It can be seen from the above sections that as usual, the administrative officers are empowered to collect taxes without the aid of any judicial process, and yet "due process of law" has not been violated. (Glidden vs. Harrington, 23 Sup. Ct. 574, 47 L. Ed. 798).

By the provisions of Section 5007 the manner of assessing, collecting and distributing the *liquor tax* is adopted as the mode of assessing, collecting and distributing the *cigarette tax;* its defects, if any, will effect the cigarette tax, and vice versa. The above sections were all enacted by the twenty-fifth Gen. Assembly, Ch. 62, at the same time and by the same act, and in construing and interpreting them, they should *all* be taken together to give the full force and effect to the act.

For example, suppose we say that Sections 2433 (which provides for the listing by the Assessor of persons liable to the tax), and 2435, (which also provides for listing by three citizens of the county), cannot be considered or given any weight in passing upon the act, will anyone question the

provisions of the subsequent sections to enforce the end sought—that of collecting taxes? If no one is empowered by law to list the persons liable for taxation, and no person is held for taxes, certainly any and all provisions for the collection of these taxes against any person are nugatory and ineffective for want of subject matter: How could A's property be legally sold under Section 2439, (which provides for a tax sale), if the Treasurer had no legal and official knowledge that such a person as A owned property, or even existed?

If, therefore, Sections 2433 and 2435 are *necessary* to give this act the full force and effect its originators intended it should have, then for a similar reason it would be improper and contrary to the rules of construction and interpretation to leave out, separate and not consider Sections 2441, 2442 and 2444—other sections of the same act, which give the tax-payer opportunity to be heard before his property can be taken for the non-payment thereof.

Sections 2441, 2442 and 2444 provide "for a board of revision, authorized to hear complaints respecting the justice of an assessment, and prescribe the time during which, and the place where such complaints may be made." (Hodge vs. Muscatine County, 96 N. W., 968). It has been held that a tax law to be constitutional, cannot take property for the non-payment of taxes, unless the tax-payer has the opportunity to be heard in relation thereto, and that such tax, so taken, is not without "due process of law." "The meetings of the board of revision are fixed by law, and of these all persons must take notice."

Hodge vs. Muscatine Co., 96 N. W., 968.

Palmer vs. McMahon, 10 Sup. Ct., 327, 33 L. Ed., 772.

Glidden vs. Harrington, 23 Sup. Ct., 574; 47 L. Ed., 798.

The intention of Sections 2441, et seq., is to provide, and they do provide, such measures as take the liquor tax law from under the prohibition of "taking property without due process of law;" said sections certainly save the law from that objection, and consequently, no notice to the owner of the property assessed and levied upon is necessary. (Davidson vs. New Orleans, 96 U. S., 97, 24 L. Ed., 616). Nor is it necessary that the person who conducts the business be present or have an opportunity to be present, when the assessment is made. (McMillan vs. Anderson, 95 U. S., 87, 24 L. Ed., 335).

Consequently, Section 2441, et seq., being as much a part of the provisions of the mulct liquor tax as Sections 2438 and 2435, they should be considered along with the other sections in determining the constitutionality of the cigarette tax in Section 5007, because said Section 5007, by its terms, includes those provisions of the mulct liquor tax relating to the assessing, collecting and distributing such tax.

As a conclusion, we therefore think that the cigarette tax, Section 5007, is in the nature of a penalty and an occupation charge; that it is assessed, collected and distributed the same as the mulct liquor law; that no notice to a property owner is necessary to be given; that the objection that it "takes property without due process of law" is without foundation, and that said section is, therefore, constitutional.

(e)

Is Section 5007 in contravention of Section 7, Article 7, of the Constitution of Iowa?

Article 7 of the Constitution is entitled "State Debts," and Section 7, under such title, reads as follows: "Every law which imposes, continues or revives a tax, shall distinctly state the tax, the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

As the above Section 7 is part of the Article "State Debts," and Section 7 provides for a tax—such tax must be for the purpose of meeting the "State Debts," and the Article and Section are nothing more than a law for general taxation and creation of general taxes.

We believe the cigarette tax is not a general tax, nor subject to the law of general taxation, but, rather, in the nature of a penalty and an occupation charge, (Ferry vs. Deneen, 82 N. W., 424, and Smith vs. Skow, 66 N. W., 893), and that any law relating to general taxes, such as Section 7, and especially Article 7 provides, does not apply to this tax question. (102 Ill., 560.)

Is the tax distinctly stated?

Section 5007 says: "There shall be assessed a tax of three hundred dollars per annum against every per on, etc., and upon the real property and the owners thereof, within and whereon any cigarettes, etc., are sold or given away, or kept with the intent to be sold, bartered or given away, under any pretext whatever."

A statute should be construed "according to the context and the approved usage of the language." * * *

Section 48, Par. 2, Code of Iowa.

Taking this rule for the constructing of Section 5007, we find said Section distinctly stating that the tax shall be: "a tax of three hundred dollars per annum * * * ," and there can be no question but that the tax is mentioned and is definite.

Is the object of the tax stated?

We also find said Section distinctly stating the object of the tax, in the heading: "Tax for *Sale*," also in the body thereof: " * * * within and whereon any cigarettes are sold or given away, or kept with the intent to be sold, bartered or given away under any pretext whatever." There can be no question but that the main point or object to which the tax is to be applied is the sale or gift of cigarettes. By the terms of the Section, it does not refer to any other law to fix such tax or object.

We would, therefore, say that Section 5007 is within the meaning of Section 7, Article 7 of the Constitution of Iowa, as it specifically provides for the "fixing" of the tax, its "object" and does not refer to any other law to "fix such tax or object."

It is a self evident truth, that if the legislature has certain definite powers to enact laws, as for instance, to enact any law relating to the mode, form and extent of taxation within its jurisdiction, which is not in conflict with the Constitution of the United States, and, in enacting such law, enacts it by virtue of those certain definite powers, then the act in question will be valid and constitutional. In this case, the legislature, having an unlimited power of taxation, and, not in violation of the Federal Constitution, have seen fit to enact a law taxing the sale, etc., of an article injurious to health and morals, under that sovereign right, certainly, then the legis-